received medical and wage replacement benefits in connection with the job-related injury that Hinojosa reported to Jostens on April 23, 1997, had retained Ashcraft to meet with Hinojosa and obtain an Affidavit from him in connection with Hinojosa's employee injury claim. R. 705: 95-96, 135, 138-39, 173-74, 183, 198-99. The purpose of the meeting with Hinojosa and procuring his Affidavit was to obtain information about Hinojosa's job-related injury, limitations, and physical abilities. R. 705: 138-39, 173-74, 199.

Based on information that Hinojosa provided during the meeting, Ashcraft prepared an Affidavit, which was reviewed by Hinojosa before he signed it. R. 705: 138, 140, 145, 238-39. After reading the document, Hinojosa deleted one sentence and initialed his change on the Affidavit before signing it. R. 705: 145-46, 227, 238-39. Hinojosa made no other revisions to his Affidavit. *Id.* In his Affidavit, Hinojosa swore that the facts recited therein are true. R. 705: 226. Hinojosa testified that he had experienced continuous problems since April 1997 with pain in his right shoulder, arm, and forearm and admitted in his Affidavit that "[s]ince the date of my injury in April 1997, I have not been able to perform my duties as a Diamond Setter and I am still unable to work today." R. 705: 227. Hinojosa also stated in his Affidavit that when he attempted on September 11 and 12, 2000 to perform restricted duty in the Layout position, he was unable to put the rings into the boxes because this task required him to raise his arm, which caused significant right shoulder pain. *Id.*

Hinojosa reaffirmed the truth of the statements made in his Affidavit in sworn testimony that he gave on September 4, 2001 at a hearing conducted by Texas State District Judge Karen Johnson in the state court action that Hinojosa filed

against Jostens.[2] R. 705: 238-39. Hinojosa testified under oath that no misrepresentations of fact are contained in his Affidavit and that the facts stated in the Affidavit are true and correct. *Id.* When Hinojosa was asked by Jostens' counsel whether Hinojosa had "lie[d] in any way or in any way misrepresent[ed] the facts stated in this Affidavit," Hinojosa replied, "[n]o." R. 705: 238.

After Hinojosa signed his Affidavit, Howard sent him home for the remainder of the day. R. 705: 150. Howard requested that Hinojosa return the next morning on September 15, 2000 for a meeting after Bauereis, Plant Manager, had reviewed Hinojosa's Affidavit. R. 705: 150, 153. Bauereis decided during the afternoon of September 14, 2000 or the morning of September 15, 2000 to discharge Hinojosa. R. 705: 148-49. Jostens also decided to discontinue payment of medical expenses and payment of further wages to Hinojosa because the 52-week eligibility period under the Plan for receipt of benefits had expired in connection with Hinojosa's employee injury claim. R. 705: 177.

Bauereis based the decision to terminate Hinojosa on his inability to perform the essential functions of the Diamond Setter and Layout Clerk positions or any other job at Jostens that was available at that time and for which Hinojosa was qualified, the statements that Hinojosa made in his Affidavit, and Hinojosa's complaints that performing Layout Clerk duties caused severe pain. R. 705: 112, 148, 171-72, 175-77. Bauereis concluded that Hinojosa was unable to perform the Layout Clerk position because

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[2] This case originated in Texas state court. Hinojosa initially brought a negligence lawsuit against Jostens in connection with his job-related injury and asserted claims against Ashcraft in connection with the Affidavit. R. 22, 24. The state court granted summary judgment for Jostens and Ashcraft on Hinojosa's claims. R. 317.

Hinojosa had complained that the job duties and even slight movement caused arm and shoulder pain. R. 705: 172, 177.

On September 15, 2000, Hinojosa met with Terry Jones ("Jones"), Human Resource Manager, and Howard. R. 705: 154-55. Jones informed Hinojosa that his employment was terminated effective September 15, 2000 because Hinojosa was unable to perform the Layout Clerk job or any other available position at Jostens. R. 705: 112-13, 155. However, Jostens offered to assist Hinojosa with obtaining Texas unemployment benefits. R. 806. Hinojosa admitted that he did not know what was in Jostens' "mind" when it made the decision to terminate him. R. 705: 86. However, Hinojosa recognized that Jostens made a "business decision" when it decided to terminate his employment. *Id.*

When Hinojosa was terminated, Jostens had no jobs available then that complied with the medical restrictions imposed by Dr. Finnegan, which limited Hinojosa to half-days performing Layout duties only, and that Hinojosa could perform with the physical limitations that he had reported to Jostens. R. 705: 112, 116-17, 171-72, 177, 202. Due to slow production and to the fluctuating demand for Jostens' products and its need for workers depending on the school graduation and sports calendars, Jostens did not have a job as a Trainer for Diamond Setters available in September 2000 when Dr. Finnegan released Hinojosa to light duty. R. 705: 171, 177, 197; 889. The Trainer position requires a worker to engage in more hand, wrist, arm, and shoulder movement than the Layout Clerk job. R. 887. A Trainer job was not open when Hinojosa was terminated on September 15, 2000. R. 705: 177, 202. Hinojosa incorrectly claims in his Petition that a Trainer job and two unidentified jobs were available at Jostens when he was terminated. *See* Pet., pp. 16, 19.

Jones also informed Hinojosa at the September 15, 2000 meeting that the Plan benefits were discontinued because

Hinojosa's one-year eligibility period had expired. R. 705: 112-13, 155. The Plan provides that the period for which a participant is eligible for payment of medical and wage replacement benefits commences on the date on which the employee sustained a job-related injury. R. 705: 199, 209, 211-13. The maximum time for which a participant may be eligible for Plan benefits ends 52 weeks after the date of injury. *Id.*

Under the Plan, Hinojosa's eligibility for medical and wage replacement benefits expired on April 2, 1998, which was 52 weeks after his injury occurred on April 2, 1997. R. 705: 183, 199, 209, 211-13. Although his eligibility under the Plan ended on April 2, 1998, Jostens voluntarily paid Hinojosa's medical expenses and wages until September 15, 2000. R. 705: 95-96, 112-13, 177, 183, 199. Jostens paid the total amount of $66,950.36, which consisted of $22,017.02 in medical expenses and $44,933.34 in wages, to or on behalf of Hinojosa in connection with his April 2, 1997 injury. R. 705: 183. When Hinojosa was terminated from employment on September 15, 2000, he was not eligible under the Plan for medical and/or wage replacement benefits. R. 705: 177, 183, 199.

Approximately two days after his termination on September 15, 2000, Hinojosa began self-employment as a property inspector conducting visual inspections of houses, photographing them, and completing reports. R. 705: 56-57. He has continued working as a property inspector for the past few years. R. 705: 47-48, 55. Hinojosa has also procured full-time employment in two different positions as a machine operator for a manufacturing company. R. 705: 48-49, 52. In approximately October 2001, Hinojosa commenced full-time employment with United Copper Industries, Inc. ("United Copper"), a company located in the same city as Jostens which manufactures electrical wire. R. 705: 48-49. During the first 10 months of his employment at

United Copper, Hinojosa operated a clipper machine that coils wire onto spools and lifted a maximum of 10 pounds. R. 705: 49-52. He was promoted to Skaltek machine operator in approximately August 2002. R. 705: 52-53. As a Skaltek operator, Hinojosa runs a computerized machine that spools large coils containing 250 feet of wire and lifts wooden pallets that weigh 25 pounds. R. 705: 50-54.

Proceedings Below

1. Hinojosa filed this lawsuit against his former employer, Jostens, alleging causes of action for disability discrimination under the ADA and under ERISA for discriminatory discharge and breach of fiduciary duty. On January 22, 2004, the United States District Court of the Northern District of Texas, Dallas Division ("District Court"), granted summary judgment in favor of Jostens and dismissed Hinojosa's claims with prejudice. *See* Pet. App., pp. 11a-26a.

The District Court granted summary judgment on Hinojosa's ADA claim because Hinojosa was not disabled under that the statute and therefore could not establish the required elements of a prima facie case of disability discrimination. Hinojosa did not present any evidence that his right arm impairment substantially limited him in the major life activity of performing manual tasks, working, or any cognizable major life activity alleged by Hinojosa. Although Hinojosa was unable to perform the essential functions of the Diamond Setter and Layout Clerk positions at Jostens, he was not precluded from performing a broad class of jobs. *See* Pet App., pp. 13a- 20a.

Similarly, the District Court found that Hinojosa failed to establish that he had a record of an impairment that substantially limited a major life activity. Hinojosa stated that his medical records showed that he had a record of disability under the ADA. However, Hinojosa did not

identify any summary judgment evidence that allegedly supported his assertion. *See* Pet. App., p. 20a.

The District Court also held that Hinojosa failed to raise a genuine issue of material fact about whether Jostens terminated his employment or did not place him in a Diamond Setter Trainer job because Jostens regarded Hinojosa as disabled under the ADA. Jostens' summary judgment evidence established that Hinojosa, whose doctor had restricted him to light duty work limited to four hours a day, was unable to perform his regular job as a Diamond Setter or the Layout Clerk position, which was the lightest job at the plant and which involved less hand, arm, and shoulder movement than the Trainer position. The Jostens employee who located the light duty position for Hinojosa testified that she did not believe that Hinojosa was disabled. Furthermore, the District Court found that the summary judgment evidence showed that Jostens assigned Hinojosa to the Layout Clerk position in order to comply with his medical restrictions and that Hinojosa was discharged from employment because he could not physically perform Diamond Setter or Layout Clerk duties. *See* Pet. App., pp. 20a-23a.

The District Court granted summary judgment for Jostens on Hinojosa's discriminatory discharge claim under ERISA because Hinojosa could not prove a prima facie case. Hinojosa was not eligible at the time of his termination from Jostens for medical benefits under the Plan. Since Hinojosa's eligibility for benefits had expired, the District Court reasoned that Jostens could not have terminated Hinojosa with specific intent to interfere with Plan benefits. *See* Pet. App., pp. 23a-24a.

The District Court granted summary judgment on Hinojosa's breach of fiduciary duty claim under ERISA. Hinojosa alleged that Jostens violated its duty as a fiduciary under the Plan by terminating his employment with the

alleged intent to deprive him of Plan medical benefits. The District Court determined as a matter of law that Hinojosa could not maintain his claim because Jostens acted in its capacity as an employer rather than as a fiduciary under the Plan when Jostens discharged Hinojosa. *See* Pet. App., pp. 25a-26a.

2. On appeal, in an unpublished decision filed on April 5, 2005, the Fifth Circuit held that the District Court properly rendered summary judgment for Jostens on Hinojosa's ADA and ERISA claims and affirmed the Judgment of the District Court. *See* Pet. App., pp. 1a-10a. The Fifth Circuit agreed with the District Court that Hinojosa did not raise a genuine issue of material fact regarding whether he was disabled under the ADA. As the basis for its decision, the Fifth Circuit explained that Hinojosa presented no evidence that his right arm impairment substantially limited him in a major life activity such as performing manual tasks. Although Hinojosa contended that his right arm impairment made it difficult for him to perform activities of daily living, Hinojosa did not show that his alleged impairment was permanent and that it prevented or severely restricted him from performing these tasks. *See* Pet. App., pp. 2a-4a.

The Fifth Circuit also determined that Hinojosa waived his claim that he was disabled based on a record of an impairment because Hinojosa failed to adequately brief his claim by identifying supporting summary judgment evidence and case law. However, the Fifth Circuit added that even if it reviewed Hinojosa's argument that his medical records constituted a record of disability, there was no evidence that Hinojosa had a record of a substantially limiting impairment. *See* Pet. App., pp. 4a, 9a-10a.

Like the District Court, the Fifth Circuit concluded that Hinojosa failed to raise a genuine issue of material fact about whether Jostens terminated his employment or did not place Hinojosa in a Diamond Setter Trainer job because

Jostens regarded Hinojosa as disabled under the ADA. As the basis for its decision, the Fifth Circuit explained that Jostens made permissible inquiries under the ADA regarding Hinojosa's abilities to perform the Diamond Setter and Layout Clerk positions and that Jostens assigned Hinojosa to the Layout job in order to comply with the work restrictions imposed by Hinojosa's treating doctor. The Fifth Circuit further explained that the fact that Jostens discharged Hinojosa because he was unable to perform the duties of any job available at Jostens then did not establish that Jostens perceived Hinojosa as disabled. *See* Pet. App., pp. 5a-6a.

Finally, the Fifth Circuit affirmed summary judgment on Hinojosa's claims under ERISA for discriminatory discharge and breach of fiduciary duty. The Fifth Circuit based its determination on the same reasons as the District Court. *See* Pet. App., pp. 6a-8a. Judgment was entered for Jostens on May 4, 2005.

REASONS FOR DENYING THE WRIT

Though Petitioner's asserted bases for seeking the writ are at best unclear, Petitioner appears to contend that the Fifth Circuit's decision holding that he failed to establish a prima facie claim of discrimination under the ADA warrants review because it (1) is directly at odds with this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); (2) creates an intractable split with the decisions of six other courts of appeals; and (3) creates an intra-circuit conflict with the Fifth Circuit's decision in *McInnis v. Alamo Community College District*, 207 F.3d 276 (5th Cir. 2000). Pet., p. 9. Those assertions are uniformly wrong and fail to provide any basis for granting review.

Reeves stands only for the rule that a plaintiff-employee's prima facie case of discrimination, when coupled with evidence providing a reasonable basis to reject the

employer's nondiscriminatory explanation for its decision may be adequate to sustain a finding for intentional discrimination. Here, of course, the Fifth Circuit had no reason to apply *Reeves* because it concluded Plaintiff failed to carry its burden to provide a prima facie case of disability discrimination. The Fifth Circuit's decision does not conflict with *Reeves*.

Nor does the Fifth Circuit's decision conflict with the decisions of the Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuits. Here, the Fifth Circuit granted Jostens' motion for summary judgment because Petitioner did not produce enough evidence to establish a prima facie case that he was disabled. In the decisions of these other courts, the courts applied the same law and held the plaintiffs to the same burden of proof as the decision below. The fact that the plaintiffs in the other cases carried their burdens while Petitioner did not does not in any way create a circuit split or present an issue warranting review.

Finally, Petitioner's claims based on ERISA do not provide any basis for granting the writ. Tellingly, Petitioner identifies no such basis but instead simply argues the Fifth Circuit reached the wrong conclusion on the merits. That is not a reason that justifies this Court's review. And to the extent Petitioner seeks the writ on any other grounds, those arguments are waived. [3]

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[3] Petitioner's meandering petition asserts there are no less than 13 questions presented in this appeal. In Questions Nos. 1, 2, 3, 4, 7, and 8, Petitioner appears to seek review of his disability discrimination claim on an the grounds that there he produced evidence showing an alleged record of impairment. The Fifth Circuit determined, however, that Petitioner waived this claim in his appeal because he failed to brief the issue and therefore did not identify any summary judgment evidence that allegedly supported his claim. *See* Pet. App., p. 4a. Likewise, in Questions Nos. 2, 6, and 12, Petitioner seeks review of his contention that Jostens' reasons for terminating him were pretextual and that Jostens

I. THE PETITION IDENTIFIES NO CONFLICT WITH A DECISION OF THIS COURT OR ANY OTHER COURT

The Fifth Circuit granted Jostens' motion for summary judgment because it concluded that Petitioner failed to carry his burden to show a prima facie case of disability discrimination. To establish a prima facie case of disability discrimination, a plaintiff must produce some evidence showing (1) he has a disability; (2) he is qualified for the position in which he seeks employment, and (3) he was discharged because of his disability.

The Fifth Circuit affirmed the district court's dismissal of this case on the grounds that Petitioner failed to establish any evident consistent with prong one, *i.e.*, that he had a "disability." Relevant here, under the ADA, a plaintiff can prove a "disability" if he produces evidence showing he was "regarded as" having "a physical impairment that substantially limits one or more [his] major life activities ...." 42 U.S.C. § 12102(2)(C); 29 C.F.R. § 1630.2(g)(3). The EEOC Regulations further state that an individual is "regarded as" having such an impairment if the individual (a) has a physical impairment that does not substantially limit major life activities but is treated by his employer as constituting such limitation or (b) has none of the physical impairments defined in 29 C.F.R. § 1630.2(h)(1) but is nevertheless treated by his employer as having a substantially limiting impairment. 29 C.F.R. § 1630.2(*l*)(1), (3). Additionally, the Supreme Court has held that, to establish disability under this definition, a plaintiff must

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failed to provide him with reasonable accommodations. But the Fifth Circuit never even reached those issues because it determined that Petitioner failed to raise a genuine issue of material fact regarding a prima facie case of disability discrimination under the ADA. Finally, Questions Nos. 5 and 6 are also not properly before this court because Petitioner has never asserted an ERISA retaliation claim.

prove that his employer (a) *mistakenly* believed that he had an impairment that substantially limited one or more major life activities, or (b) *mistakenly* believed that an actual, nonlimiting impairment substantially limited one or more major life activities. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

The Fifth Circuit here concluded that Petitioner failed to carry his burden to establish a prima facie case that Jostens "regarded" him as disabled. That conclusion is neither at odds with this Court's decision in *Reeves* nor departs from—let alone conflicts with—the law applied in the Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits.

1. Contrary to Petitioner's assertion, the Fifth Circuit's holding does not conflict with this Court's holding in *Reeves*. *See* Pet., pp. 8-11. In *Reeves*, this Court ruled that when a plaintiff proves a prima facie case of discrimination and points to sufficient evidence of pretext (*i.e.*, that the legitimate, nondiscriminatory reason offered by the employer was false), that evidence alone may permit the trier of fact to conclude, without additional independent evidence of discrimination, that intentional discrimination occurred. *Reeves*, 530 U.S. at 147-48. Here, the Fifth Circuit dismissed Petitioner's claim on the grounds that he failed to establish that he was "disabled" under the ADA—a required element of a prima facie case of disability discrimination. *See* Pet. App., pp. 2a-6a. Since the Fifth Circuit concluded that Petitioner failed to raise a genuine issue of material fact regarding a prima facie case of discrimination under the ADA, it never addressed his argument that Jostens' reason for terminating his employment was a pretext for discrimination. *See* Pet. App., p. 10a. The holding of *Reeves* therefore has no bearing on whether Petitioner established a prima facie case of disability discrimination because the Court never proceeded to the burden-shifting stage to which *Reeves* is relevant.

Moreover, in *Reeves*, the Court reiterated the fundamental principle that under the burden-shifting framework a plaintiff must first establish a prima facie case of discrimination. 530 U.S. at 142. *Reeves*, therefore directly supports the Fifth Circuit's conclusion.

2. The Petitioner's argument for a conflict among the circuits fares no better. Petitioner appears to assert that the Fifth Circuit created a conflict by holding that an employer's decision to terminate an employee on the grounds that that employee could not perform any position available at that time with the employer, without more does not prove a prima facie case that the employer "regarded" the employee as disabled. Petitioner claims that the Fifth, Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have all squarely held that a plaintiff may prove he was "regarded as" disabled by his employer if he adduces evidence showing the employer did not believe he could perform any of that employer's jobs. For two reasons, Petitioner's argument for a conflict is wholly unpersuasive.

First, Petitioner's characterization of the holdings of the Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits is simply wrong: in the cases Petitioner cites, those courts applied the *same* test the Fifth Circuit applied here. The courts asked whether an employer "mistakenly believed" (1) that the plaintiff had a physical impairment that substantially limited a major life activity *or* (2) that an actual, nonlimiting impairment substantially limited one of the plaintiff's major life activities. *See Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 188, 192 (3d Cir. 1999) (employer's misperception that employee cannot perform wide range of jobs is sufficient to establish claim of "regarded as" disabled); *Buskirk v. Apollo Metals*, 307 F.3d 160, 167 (3d Cir. 2002) (definition of perceived disability may be satisfied by demonstrating that employer had misperception about existence or severity of impairment); *Henderson v. Ardco*,

Inc., 247 F.3d 645, 650 (6th Cir. 2001) (under ADA, employee may be regarded as disabled if employer mistakenly believes that he has substantially limiting physical impairment or mistakenly believes that actual, nonlimiting impairment substantially limits major life activity); *Riemer v. Ill. Dep't of Transp.*, 148 F.3d 800, 806 (7th Cir. 1998) (individual with impairment that does not substantially limit major life activity may meet test for "regarded as" disability by showing that employer nevertheless treated him as having substantially limiting impairment); *Ollie v. Titan Tire Corp.*, 336 F.3d 680, 685 (8th Cir. 2003) (employee may show perceived disability based on employer's mistaken belief that he had impairment that substantially limited major life activity or that employee's actual, nonlimiting impairment substantially limited major life activity); *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1226 (9th Cir. 2001) (employee may fall within perceived disability provision of ADA if employer mistakenly believed that employee had impairment that substantially limited major life activity or mistakenly believed that actual, nonlimiting impairment substantially limited major life activity); *McKenzie v. Dovala*, 242 F.3d 967, 971 (10th Cir. 2001) (analyzing claim that employer discriminated against plaintiff based on a "mistaken perception" of impairment). Nothing, then, about the law those courts applied conflicts with the identical test the Fifth Circuit applied here. *See* Pet. App., pp. 4a-5a.

Second, Petitioner likewise errs by asserting the Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits impose a lower burden of proof on plaintiffs to prove a prima facie case of discrimination based on disability. To be sure, those cases do not hold *as a matter of law* that a plaintiff can carry its burden to prove a prima facie case of disability under the "regarded as" prong merely by proving the employer believed the plaintiff could not do any other job it offered.

Indeed, that is not the law. *See Sutton*, 527 U.S. 489 (noting plaintiff must show the employer was *mistaken* in believing he was substantially limited in performing a major life activity). Instead, those courts applied the same legal test to different factual circumstances and concluded that, unlike here, the plaintiff failed to carry its burden to assert a prima facie case that he was "regarded as" disabled by his employer. That those courts reached different conclusions simply based on different facts, and not the application of conflicting law, demonstrates that review is unnecessary.

That fact is made all the more clear when one examines each of Petitioner's cited cases: in *all* of those cases there was some evidence, consistent with the doctrinal test to show an employee was "regarded as" disabled that the employer "mistakenly believed" that the employee was impaired.

a. *Third Circuit.* In the Third Circuit's decision in *Taylor*, for example, the court reversed a grant of summary judgment to the defendant-employer where there was evidence that the employer misinterpreted the employee's medical records and erroneously concluded that the employee was subject to more severe work restrictions than the limitations actually imposed by the employee's treating doctor. *See Taylor*, 177 F.3d at 183-84. Although the plaintiff's physician marked on a physical capacity evaluation form completed at the employer's request that the employee's work restrictions due to his ankle injury were temporary, the employer stated in a termination notice that the employee was under permanent restrictions on his abilities to stand, walk, and lift, which was not true. *Id.* Based on the employer's misperceptions about the scope of the employee's abilities, the Third Circuit concluded that the employee was "regarded as" disabled. *Id.* at 184.

The Third Circuit's decision in *Buskirk* is even more off base. There, on the employee's appeal of the district court's

decision to grant the employer's post-trial motion for judgment as a matter of law, the employer did not dispute that it regarded the employee as disabled under the ADA, but instead argued over "its obligations to [provide reasonable accommodations] a 'regarded as' employee." *Buskirk*, 307 F.3d at 167-68. In passing, the Court briefly discussed its conclusion that the plaintiff presented sufficient evidence at trial to establish that his employer had regarded him as disabled, noting that after the employee had worked successfully on a reduced work schedule for more than a year under a light duty release, the employer nonetheless placed the employee on leave because he could not perform his regular job and the company determined that it did not have any vacant permanent positions that met the employee's physical capabilities. *Id.* When the doctor later removed some of the employee's restrictions and released him to full-time hours, the employer refused to put the employee back to work. *Id.* at 164. Despite the release, the company concluded that the employee remained unable to perform any of its jobs and informed the employee in a letter that although his condition had improved, the employer had reservations about his ability to perform the positions. *Id.* at 164, 170.

b. *Sixth Circuit.* The Sixth Circuit's decision in *Henderson* was premised on these same concerns holding that the plaintiff carried its burden under the "regarded as" prong where it produced substantial evidence showing the employer "mistakenly believed" he was disabled. Among the evidence the court relied on as proof that the plaintiff carried his burden was (1) a doctor's release stating that the employee was physically able to resume working with certain limitations (which the employer ignored), 247 F.3d at 647-48; (2) the employer's refusal to allow an employee to return to work despite the fact the employee had been medically cleared for restricted duty, *id.* at 647; and (3) the employer's decision to reject the plaintiff's request for a

light duty assignment even though the plant had openings that complied with the work restrictions set by the employee's doctor, *id.* at 648. Because this evidence showed the employer reached its conclusion about the employee's ability to work independent of the medical information and treated the employee as more impaired than her physician indicated that she was, the court concluded the plaintiff satisfied her burden.

c. *Seventh Circuit.* In *Riemer*, the Seventh Circuit considered whether the district court erred by refusing to grant the defendant-employer's post-trial motion for judgment as a matter of law where a jury found that an employee was "regarded as" disabled. Significantly, on appeal the employer in *Riemer* did not dispute that it "perceived Mr. Riemer's asthmatic condition as a limitation on his major life activity of breathing." 148 F.3d at 806. The case therefore turned on whether the employer ignored the results of the employee's evaluation by his treating doctor, formulated its own belief regarding the effects of the employee's condition which was inconsistent with the physician's opinion, and restricted the employee in a manner that the doctor did not deem necessary. *Id.* at 802-03. The employee's doctor notified the defendant that the employee, who had taken a brief leave of absence when exposure to fumes in the defendant's iron fabrication shop exacerbated his asthma, was medically fit to return to full duty without limitations and that his asthmatic condition was totally controlled. *Id.* at 802. Although the doctor twice assured the employer that it was safe for the employee to work in the fabricating department, the employer nevertheless concluded that the employee's asthma prevented him from working in the shop and therefore reassigned him to an outside field position. *Id.* at 802-03, 806-07. The court therefore concluded that the evidence of the employer's persistent pattern of ignorance provided a reasonable basis

for the jury to conclude the employee was "regarded as" disabled.

d. *Eighth Circuit.* Just like *Riemer*, the issue in the Eighth Circuit's decision in *Ollie* was whether the district court correctly refused to grant an employer's post-trial motion for judgment as a matter of law. The doctor conducted a pre-employment examination of the plaintiff and stated in his report that the plaintiff was medically able to carry out the essential functions of a tire building job but noted that due to his history of asthma the plaintiff might experience difficulty in areas with dust or fumes. 336 F.3d at 683, 686. The company misconstrued the results of the plaintiff's physical to mean that he could not work near any dust or fumes. *Id.* at 683-84, 686. Based on its misinterpretation, the defendant refused to hire the plaintiff and informed him that there were no jobs available for him since the doctor had instructed the company that the plaintiff could not be exposed to dust or fumes. *Id.* at 684. And just like in *Riemer*, the Eighth Circuit held that this evidence that the employer incorrectly interpreted medical advice furnished by its company doctor provided a reasonable basis for the jury to conclude the employee was "regarded as" disabled. *Id.* at 683-84.

e. *Ninth Circuit.* In the Ninth Circuit's opinion in *Johnson*, the Court reversed the district court's decision granting defendant judgment as a matter of law where plaintiff produced evidence that the employer rejected a work release in which the employee's doctor stated that she had recovered sufficiently from a leg injury and was physically able to resume working with specified limitations. *See* 251 F.3d at 1223-24. Although the employee had been medically approved for restricted duty, the employer refused to permit her to return to work based on its personnel policy that required an unlimited work authorization. *Id.* at 1224. The employee obtained an

unrestricted work release soon after she resigned. *Id.* Despite the employee's complete medical clearance, the defendant still refused to hire her for any of the numerous job vacancies in the fields in which the employee had previously worked for the employer. *Id.*

f. *Tenth Circuit.* Finally, in *McKenzie*, the Tenth Circuit reversed a grant of summary judgment to an employer, finding clear evidence that the employer's decision to terminate the plaintiff was based on an unsubstantiated belief that she was disabled. There, shortly after the plaintiff resigned from her position as a deputy sheriff, her doctor notified her employer that she could return to work because her mental condition had improved. 242 F.3d at 968. Although the doctor had determined that the plaintiff was well and capable of fulfilling her duties, the employer decided nonetheless that the plaintiff should not work in the law enforcement field and refused to consider her for any available positions. *Id.* On this basis, the court concluded the employer treated the plaintiff as though she still suffered to the same extent from psychological illnesses that had caused her to previously stop working and therefore she was "regarded as" disabled, despite the lack of any such impairment. *Id.* at 968-69, 970-71.

3. In stark contrast to the evidence plaintiffs produced in these cases, Petitioner falls remarkably short of carrying his burden to show a prima facie case that he was "regarded as" disabled by Jostens. Unlike the employers in the cases discussed above, Jostens did not "mistakenly believe" that Petitioner had a substantially limiting right arm impairment. The undisputed summary judgment evidence established that Jostens assigned Petitioner to the Layout Clerk position in order to comply with Dr. Finnegan's work restrictions, which specifically limited Petitioner to restricted duty performing the Layout Clerk job for four hours a day. R. 705: 120-21, 189. *By his own admission,*

when Petitioner was terminated from employment, he (1) was unable to perform Layout duties, and (2) had not been released by Dr. Finnegan to return to his regular position as a Diamond Setter, perform any other available position at Jostens, or work as a Trainer. R. 705: 189, 227 Furthermore, there were no other jobs available at that time at Jostens that fit the restrictions imposed by Dr. Finnegan. R. 705: 112, 171, 202. Unlike the employers in the cases in which the other Circuits concluded that evidence supported claims of perceived disability, the unrebutted evidence shows Jostens did not misinterpret or disregard Dr. Finnegan's medical opinion; it instead treated Petitioner consistent with the medical information provided by Dr. Finnegan. Accordingly, Jostens' treatment of Hinojosa does not satisfy the *Sutton* requirements for "regarded as" disability.

4. Although these facts provide a more than sufficient reason to conclude there is no circuit split, Petitioner's cases are also easily distinguished on the facts because, in the four cases where it was even an issue, the plaintiff produced specific evidence showing the employer considered regarded him as substantially limited *in a major life activity*. On this basis, those courts concluded that plaintiff could have performed a wide range of jobs that the employer refused to offer.

Thus, in *Taylor*, for instance, the Third Circuit reversed the motion for judgment granted for the employer because the evidence admitted at trial was sufficient for submission of the employee's perceived disability claim to the jury for determination. *Taylor*, 177 F.3d at 182-83. The Court based its conclusion on the fact that the employer appeared to have considered the employee to be incapable of performing a wide class of jobs, *id.* at 183, 188, 196—a fact that was made all the more clear by the employee's termination notice which stated the employee could no longer do his

regular job or any other available position because of restrictions on his abilities *to stand, walk, lift, carry, reach, push, pull, bend, squat, climb, crawl, and use leg controls.* *Id.* at 184, 188. Because the employer clearly and explicitly stated the employee could not perform a panoply of major life activities, the Court had no trouble determining that the employer regarded the employee as disabled. *Id.* at 188.

Similarly, in holding that the employee in *Henderson* produced sufficient evidence to create a genuine issue of material fact precluding summary judgment on her perceived disability claim, the Sixth Circuit Court pointed out that the employee presented specific evidence regarding the size and nature of the class of jobs that her employer concluded that she was not capable of doing, job descriptions which demonstrated that the company had open positions that fit the employee's work restrictions, and some evidence that manufacturing represented a significant portion of the jobs locally available to the plaintiff. 247 F.3d at 648, 653 & n.5. Additionally, the employee produced evidence which indicated that the defendant's manager believed that a person with physical restrictions was unable to perform factory work even if the duties did not exceed the worker's restrictions. *Id.* at 651.

Likewise, in concluding that sufficient evidence supported the jury's verdict that the plaintiff was perceived as disabled under the ADA in *Ollie*, the Eighth Circuit reasoned that the plaintiff produced evidence at trial which showed that the company to whom he applied for employment regarded him as unable to perform a class of jobs. 336 F.3d at 687. The evidence included admissions made by the defendant's human resource staff that they had determined contrary to the medical evidence that the plaintiff's asthma prevented him from working in any position that involved contact with dust or fumes and that they also believed that all warehouse and manufacturing

jobs included working around dust and fumes. *Id.* Their testimony established that the employer regarded the plaintiff as significantly restricted in his ability to perform a class of jobs consisting of manufacturing or warehouse positions throughout the plaintiff's town. *See id.* at 686-87.

Finally, in *McKenzie*, the Tenth Circuit determined that summary judgment for the employer was precluded on the plaintiff's "regarded as" disabled claim because she raised a genuine issue of material fact about whether the defendant perceived her as substantially limited in her ability to work in all law enforcement positions. *McKenzie*, 242 F.3d at 971-72. The summary judgment proof included deposition testimony in which defendant's personnel admitted that they believed that due to the employee's past psychological illnesses it was not in her best interest to regain a law enforcement job, that she would be better off in a different field of work, and that the employee should not be a law enforcement officer. *Id.* at 968, 970-72. The Tenth Circuit also explained that the employer attempted to have the plaintiff's certification as a peace officer revoked to prevent her from serving in a variety of law enforcement related posts. *Id.* at 968-69, 970.[4]

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[4] In Petitioner's remaining cases the courts did not even analyze whether there was sufficient evidence showing the employers perceived the employees as substantially limited in a major life activity. *See Riemer*, 148 F.3d at 807 (noting plaintiff did not allege that he was perceived as disabled in working and therefore not addressing whether the employee demonstrated that his employer regarded him as precluded from a class of jobs or a broad range of jobs); *Johnson*, 251 F.3d at 1226 n.3, 1228 (determining that the defendant failed to preserve for appeal the issue of whether the plaintiff established that the defendant perceived her as substantially restricted in the ability to perform a class of jobs or a broad range of jobs); *see also Buskirk*, 307 F.3d at 168-70 (noting that a plaintiff is required to show that his employer mistakenly perceived him as unable to work in a wide range or broad class of jobs, but not detailing the evidence that was admitted at trial which satisfied this requirement).

Here, unlike the plaintiffs in the cases discussed above, Petitioner presented *no evidence* demonstrating that Jostens regarded him as significantly restricted by his right arm impairment in his ability to perform an entire class of jobs, a broad range of jobs or to engage in any other major life activity. In particular, Petitioner produced no summary judgment proof showing that Jostens perceived him to be substantially limited in a non-work major life activity compared to the average person in the general population and/or establishing the number and types of jobs in the Denton, Texas area which Jostens allegedly believed that Hinojosa was unable to perform. *See* 29 C.F.R. § 1630.2(j)(1)(ii), (3)(i), (ii)(A)-(C). Furthermore, the Human Resource Assistant who located the light duty position for Hinojosa testified that she did not regard Hinojosa as disabled. R. 705: 120-21.

Because the decisions of these other Circuits turned on case-specific facts different from the circumstances presented in Hinojosa's perceived disability claim, it cannot be concluded that the other Circuits would have decided Hinojosa's case differently from the Fifth Circuit. There is no circuit split warranting review.

5. Last, Petitioner wrongly asserts that the Fifth Circuit's decision here creates an intra-circuit split with the Fifth Circuit's decision in *McInnis v. Alamo Community College District*, 207 F.3d 276 (5th Cir. 2001), and that this intra-circuit split requires this Court's review. Putting aside the fact the Court's decision below does not depart from *McInnis*—both cases applied the same test for determining whether an employee was "regarded as" disabled which this Court set forth in *Sutton*—it is well-settled that an intra-circuit provides no basis for this Court's review.

II. PETITIONER'S CLAIMS FOR DISCRIMINATORY DISCHARGE AND BREACH OF FIDUCIARY DUTY UNDER ERISA DO NOT WARRANT THIS COURT'S REVIEW

The Court should deny the Petition for review of Hinojosa's discriminatory discharge claim under Section 1140 of ERISA and his breach of fiduciary duty claim under Sections 1109 and/or 1132 of the statute because Hinojosa failed to articulate any reason upon which review may be based. *See* Pet., pp. iv, 26-29.

Hinojosa does not allege that the Fifth Circuit's decision affirming summary judgment for Jostens on his ERISA claims conflicts with the decision of another Circuit. He also does not contend in his Petition that the Fifth Circuit decided an important federal question in a manner that conflicts with a decision of this Court or the Texas Supreme Court, departed from the accepted and usual course of judicial proceedings, and/or decided an important question of federal law that should be settled by this Court. *See* Pet., pp. iv, 26-29; Sup. Ct. R. 10(a), (c). Accordingly, Hinojosa's Petition for review of his ERISA claims should be denied.

CONCLUSION

For the reasons stated, the Petition should be denied.

Respectfully submitted,

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